United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-2013

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FOR THE SECOND CIRCUIT

Docket No. 75-2013

UNITED STATES OF AMERICA,

Respondent,

versus

SAMUEL MANARITE,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S BRIEF

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether a sentence and judgment imposing a period of imprisonment and a fine, qualified by an order of conditional commitment until such fine is paid, is wholly satisfied by fulfillment of such condition?

2. Whether a sentence and judgment imposing a period of imprisonment and a fine, qualified by an order of conditional commitment until such fine is paid, is constitutionally prohibited?

3. Whether the District Court erred in denying Appellant's

motion to vacate judgment where the record shows that material, exculpatory evidence was suppressed by the prosecution in the trial of the case?

4. Whether the District Court erred in denying Appellant's motion to vacate judgment without holding an evidentiary hearing to resolve Appellant's averment of prosecutorial suppression of material, exculpatory evidence in the trial of the case?

STATEMENT OF THE CASE

A.

NATURE OF THE CASE

This is an appeal from an order of the United States District Court for the Southern District of New York, the Honorable EDMOND PALMIERI, Judge, denying Appellant MANARITE'S motion to vacate sentence and judgment made pursuant to 28 U.S.C. § 2255.

B.

STATEMENT OF THE FACTS

On December 16, 1969, an indictment 69 CR 892, was filed in United States District Court for the Southern District of New York (A-1a) charging MANARITE, along with one RICHARD J. PORTELA, with a violation of 18 U.S.C. §§ 894 and 2 (A.19a). Specifically, the indictment charged MANARITE with unlawful, willful and knowing participation in the use of extortionate means, within the meaning of 18 U.S.C. § 891(7), to collect and attempt to collect an extension of credit from PHIL FRIMET. The violation was alleged to have occurred from April 1, 1969 continuously through October 1, 1969 (A.19a).

At the trial of this case the Government sought to prove the charges through the testimony of its chief prosecution witness PHIL FRIMET. Viewed as a whole, the record reflects that the case would stand or fall on the credibility of this witness, as the other witnesses called by the prosecution were merely to corroborate aspects of FRIMET'S testimony; their testimony alone could not establish the elements of the offense.

It is to be noted that at the time of the indictment in this case, FRIMET stood indicted, along with MANARITE, for transporation in interstate commerce of obscene materials and conspiracy to do so (A.4a). Additionally, FRIMET had been arrested on May 22, 1969, and charged with manufacture, possession and distribution of counterfeit stamps (A.25a.5-15, A.26a.5-11). Moreover, in the course of the trial it was revealed that prior to indictment in the instant case, indeed prior to the dates of occurrence of the alleged violation in the instant case, FRIMET had been charged with at least two separate violations of New York State law (A.20a-23a).

It was disclosed in cross-examination of FRIMET that he was yet to be sentenced for these violations of State pornography laws dating back to early 1969 (A.21a.12-25) and for violations of State grand larceny laws dating back to January of 1969 (A.23a.18-25). Further, during MANARITE'S trial on May 20, 1970, counsel for MANARITE sought to disclose any agreement the witness might have with the Government for consideration in the

disposition of the witness' pending criminal matters, but FRIMET denied any such agreement (A.27a.23-25, A.28a.1-22). When questioned as to whether or not the Government had agreed to bring his cooperation to the attention of the sentencing courts in the witness' other pending State and Federal matters, FRIMET denied that he had ever broached the subject with the Government or its agents (A.28a.23-25, A.29a.1-17).

Subsequently, after the arrival of FRIMET'S attorney in his pending criminal cases, VICTOR ROBERTS, an inquiry was made as to the existence of any agreement between FRIMET and the Government resulting from his testimony against MANARITE (A.30a.19-25, A.31a.1-3). The Court requested full disclosure from FRIMET'S counsel, Mr. ROBERTS, of "any consideration or any promises or agreements which may be made" on behalf of FRIMET (A.31a.2-6) and ROBERTS denied the existence of any agreement (A.31a.7). The Court then inquired of the prosecutor as to the existence of any agreements "with relation to any charge" against FRIMET (A.31a.8-12) and received a negative response (A.31a.10-15). Defense counsel then inquired of the prosecutor as to any agreement to make known FRIMET'S cooperation in the MANARITE case to "any sentencing judge" in FRIMET'S other pending matters (A.31a.18-22) and was informed by the prosecutor that should FRIMET testify, he, the United States Attorney, would only go so far as to "indicate in a letter to the sentencing judge . . . that he [FRIMET] had testified" (A.32a.20-25, A.33a.2). This agreement was kept from the jury on the rationale

that FRIMET was not aware of any such agreement, not having been informed of it by his attorney (A.34a-37a).

MANARITE was found guilty by the jury on May 21, 1970. Following his conviction, MANARITE was sentenced on July 16, 1970, to fifteen (15) years imprisonment and fined $5,000.00 by the Honorable EDMOND PALMIERI, "the defendant to stand committed until the fine is paid or he is otherwise discharged according to law" (A.40a).

On October 5, 1970, in case number 69 Crim. 747, FRIMET had plead guilty to conspiring to transport obscene matter in interstate commerce (A.9a) and on December 18, 1970, he appeared in United States District Court, Southern District of New York for sentencing. At that time, a Mr. JOEL FRIEDMAN, Assistant United States Attorney for the Southern District of New York, stated the following:

> "Your Honor, <u>before this witness testified in any manner it was explained to him</u> that the Government could make no promises to him, and that all we could do was that if he cooperated by telling the truth, present the extent to which he cooperated to the Court at the time of the sentencing. Given that fact . . . that there were absolutely no guarantees, Mr. FRIMET has gone on and testified in two major Government cases.

> The first case was United States v. Manarite and F telo . . . in which Mr. FRIMET was the principal witness. . ." (A.46a.7-17).

Based on the Government's representations, FRIMET was sentenced to one (1) year probation in this case (A.49a.14-22, A.50a.18).

On November 16, 1970, in Criminal Court of the City and County of New York, Case No. B-16597/68, after the sentencing judge read a letter submitted in FRIMET'S behalf by the United States Department of Justice, FRIMET was sentenced to pay a fine of $100.00 on a conviction relating to pornography charges notwithstanding the Court's awareness of two yet unresolved State cases still pending against FRIMET at this time (A.41a-44a)

MANARITE filed a motion to vacate the sentence[1] pursuant to 28 U.S.C. § 2255 based upon the records of trial

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[1] Following the original conviction, MANARITE'S conviction was affirmed by the United States Court of Appeals for the Second Circuit, U. S. v. Manarite, 494 F.2d 1069 (1970), and the United States Supreme Court denied certiorari, Manarite v. U.S., 402 U.S. 972 (1971).

MANARITE unsuccessfully sought habeas corpus relief in 1974, in the United States District Court for the District of Kansas (unpublished opinion in case no. 74-19-C3, hereinafter attached at A.52a-55a) which was affirmed on appeal to the United States Court of Appeals for the Tenth Circuit (unpublished opinion, case no. 74-1334, hereinafter attached at A. 56a-58a) for the reason that MANARITE'S claims were not properly brought in habeas corpus, but rather were within the purview of 28 U.S.C. § 2255 (A.57a).

proceedings in this matter and upon affidavits of JEAN MANARITE (A.60a-65a), JEROME MERIN (A.66a-67a) and VICTOR ROBERTS (A.68a-69a).

The motion was denied by the Honorable EDMOND PALMIERI in an opinion filed November 8, 1974 (A.70a-75a).

It is from the denial of this motion that MANARITE now takes this appeal.

BAIL STATUS

MANARITE is presently in Federal custody at Leavenworth, Kansas, and has been in custody, pursuant to this conviction and sentence, since remanded on July 10, 1970.

ARGUMENT

I.

A SENTENCE AND JUDGMENT OF IMPRISONMENT AND FINE, QUALIFIED BY AN ORDER OF CONDITIONAL COMMITMENT UNTIL SUCH FINE IS PAID, IS WHOLLY SATISFIED BY FULFILLMENT OF THE SPECIFIED CONDITION.

On July 16, 1970, MANARITE appeared for sentencing before the Honorable EDMOND PALMIERI, having previously been found guilty by a jury of violating 18 U.S.C. § § 894 and 2. The sentence and judgment entered and filed on that date provides in part:

> "IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for a period of FIFTEEN (15) YEARS and FINED $5,000.00. The defendant is to stand committed until the fine is paid or he is otherwise discharged according to law." (A.40a).

On December 18, 1973, MANARITE made payment of $5,000.00 to the Department of Justice, Office of the United States Attorney, and received a receipt reflecting the same, in full payment and satisfaction of the judgment entered in 69 CR. 892 (A.59a).

It is Appellant's contention that this judgment, by its own language, requires incarceration only until such time as the fine is paid or the Defendant is otherwise discharged. The applicable portion of the judgment imposes in one grammatical sentence a commitment for a period of years and a fine. Distilled to its pragmatic essence, the key phrase reads "committed . . . for . . . fifteen years and fined $5,000.00." (supra). The term of commitment is then qualified by a condition which when fulfilled terminates the commitment. Here, the term of commitment is followed by the sentence ". . . committed until the fine is paid . . ." supra.

Thus, intentionally or unintentionally, the sentencing judge worded the judgment so as to allow discharge of the commitment obligation on fulfillment of the condition of payment of the fine. See, generally, 17 Am. Jur.2d Contracts, § 323 Conditions Subsequent; Corbin on Contracts, One Volume Edition, § 639 Forms of Expression That Will Make a Duty Conditional.

Therefore, by the language of the judgment, MANARITE was entitled to be discharged from custody in this case when, on December 18, 1973, he paid the $5,000.00 fine previously imposed. Moreover, the Court Below was in error in denying MANARITE'S motion for relief on this ground.

II.

A SENTENCE AND JUDGMENT IMPOSING A PERIOD OF IMPRISONMENT AND A FINE, QUALIFIED BY AN ORDER OF CONDITIONAL COMMITMENT UNTIL SUCH FINE IS PAID, IS CONSTITUTIONALLY VOID.

The judgment and sentence in this case specifically states that MANARITE stand committed until such time as the fine imposed is paid (A.40a). It is respectfully submitted that this sentence, as worded, is void and prohibited by the equal protection guarantees of the Fourteenth Amendment to the to the United States Constitution. The United States Supreme Court in Williams v. Illinois, 399 U.S. 235, 90 S.Ct. 2018, 26 L.Ed.2d 586 (1970) and Tate v. Short, 401 U.S. 395, 91 S.Ct. 668, 28 L.Ed.2d 130 (1971) perceived the Constitutional defect of such conditional commitment of indigents when scrutinized under equal protection standards. In precluding the commitment of indigents for non-payment of fines in Williams and Tate, supra, it would appear that the Supreme Court has announced a rule of Constitutional stature against the imposition of such conditional commitments. Admittedly, MANARITE was not indigent and, in fact, paid the fine (A.59a). However, this would not obviate the Constitutional requirements since the sentence here would appear void on its face under these decisions and surely Mr. MANARITE is entitled to the same equal protection considerations as any other. If equal protection considerations preclude the jailing of an indigent in

lieu of a fine as in Williams, supra, and "for failing to make immediate payment of a fine, whether or not the fine is accompanied by a jail term" as in Tate v. Short, supra, 401 U.S. at 398, 28 L.Ed.2d at 133, then the same invidious discrimination would obtain here since one similarly sentenced who had the amount of fine at the time of sentencing could immediately fulfill the condition and gain release from custody; whereas, one in MANARITE'S situation would remain incarcerated until able to pay the fine.

Thus, the judgment here involved being violative of the equal protection mandates of the Fourteenth Amendment to the United States Constitution on its face, must be deemed void on its face; and the Court Below would appear to have erred in denying MANARITE the relief on this ground.

III.

THE DISTRICT COURT ERRED IN DENYING APPELLANT'S MOTION TO VACATE THE JUDGMENT SINCE THE RECORD SHOWS THAT MATERIAL, EXCULPATORY EVIDENCE WAS SUPPRESSED BY THE PROSECUTION IN THE TRIAL OF THE CASE.

The Government's case against MANARITE rested entirely on the testimony of its chief witness, PHIL FRIMET. A perusal of the record reveals that all other prosecution witnesses served only to corroborate various aspects of FRIMET'S testimony, but in no way supplied the necessary proof of the elements of the Government's charge under 18 U.S.C. § § 894 and 2.

Early in the cross-examination of FRIMET, defense counsel sought to explore the nature of three State and two Federal criminal prosecutions pending against FRIMET at the time he testified to bring out character traits reflecting on FRIMET'S veracity and truthfulness, or lack thereof (A.20a-33a). Beyond this, defense counsel sought to explore any agreement the witness might have had with the Government for consideration for his testifying in this case in order to show bias and motive for fabrication by FRIMET. Indeed, logic suggests that the testimony of a witness given in contemplation of assistance by the proponent of that witness in avoiding a lengthy period of imprisonment be viewed with distrust. The bias and motive to fabricate inherent in such a situation exceeds the impeachment quality of

mere mention of prior convictions or commission of criminal acts.

Defense counsel inquired of FRIMET as to any agreement for consideration he might have with any Government agency in exchange for his testimony against MANARITE and were answered with flat denials of the existence of any such agreements (A.27a.23-25, A.28a.1-22). FRIMET went so far as to state unequivocally that he never even asked for assistance from Government police or prosecutorial agencies, though he had many conversations with representatives of both such agencies, and that he had no expectations of intervention on his behalf by the Government (A.28a-29a).

Perhaps astonished that FRIMET was testifying in this case with "no promises" while Federal pornography and counterfeiting charges and State pornography and grand larceny charges loomed in the background, counsel sought to question VICTOR ROBERTS, FRIMET'S attorney on these pending cases, as to the existence of any agreements with the Government. When questioned by counsel and the Court, ROBERTS flatly denied the existence of any agreements by the Government in FRIMET'S behalf (A.30a-31a). Further, the prosecutor, when questioned, stated that he had only agreed to do no more than make known the fact of FRIMET'S cooperation with the sentencing judges in FRIMET'S other matters (A.31a.18-22) (A.32a.20-25) (A.33a.2) (A.34a.6-12). The Court declined to allow the jury to be privy to this agreement, reasoning that since FRIMET claimed no knowledge of the agreement, it was not relevant (A.36a-37a).

Some months later, at FRIMET'S sentencing in the Federal pornography case, a Mr. JOEL FRIEDMAN, the Assistant United States Attorney for the Southern District of New York, stated unequivocally in open court that before FRIMET testified in MANARITE, it was explained to him the Government would present the extent to which he cooperated to the sentencing court (A.46a.7-17). Additionally, a letter was communicated to the sentencing judge in at least one State matter (A.41a-44a).

It is apparent that FRIMET, his attorney and the prosecutor, deceived the court by their mendacious testimony and representations concerning this agreement. FRIMET'S denials of any agreement with the Government are refuted by the Government itself in the Assistant United States Attorney's unequivocal statement as an officer of the court that FRIMET was personally informed of the extent the Government would act on his behalf (A.46a-47a). Though seeking to variously label this as not an agreement, no promises or no consideration, the statement of the Government agent clearly established an agreement. FRIMET is to testify and, in exchange, the Government will make the extent of his cooperation known. An act of value is performed by FRIMET for the Government in exchange for the performance of an act of value by the Government for FRIMET. The affidavit of JEAN MANARITE lends further support to the existence of an earlier agreement (compare affidavit of JEAN MANARITE at A.60a with affidavit of VICTOR ROBERTS at A.68a).

That the deliberate suppression of material, exculpatory evidence is violative of due process and a conviction so obtained

requires reversal was established in Mooney v. Holohan, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791, 98 A.L.R. 406 (1935). That "[t]he same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears" was established in Napue v. Illinois, 360 U.S. 264, 269, 79 S.Ct. 1173, 3 L.Ed.2d 1217, 1221 (1959). That suppression of material evidence justifies a new trial irrespective of good faith or bad faith on the part of the prosecution was established in Brady v. Maryland, 373 U.S. 87, 83 S.Ct. 1194, 10 L.Ed.2d, 218. Further, "[a] new trial is required if the false testimony could . . . in any reasonable liklihood have affected the judgment of the jury . . .," Napue v. Illinois, supra, 360 U.S. at 271, 3 L.Ed.2d at 1222. That where the evidence suppressed goes only to credibility, a new trial is still required, was established in Napue, supra, and Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972). Both cases involved non-disclosure of an agreement whereby the Government would speak on behalf of the witness at a later sentencing. In Giglio, the court went further and required reversal where the agreement had been made with a Government prosecutor other than the one prosecuting the case and without his knowledge, Giglio v. United States, supra, 405 U.S. at 154, 10 L.Ed.2d at 109.

In Giglio, the court recognized that ". . . the Government's case depended almost entirely on [the witness'] testimony; without it there could have been no indictment and no evidence to carry the case to the jury. [His] credibility as a witness

was an important issue in the case and evidence of any understanding or agreement as to a future prosecution would be relevant to his credibility and the jury was entitled to know of it." (emphasis added) 405 U.S. at 154, 155, 10 L.Ed.2d at 109.

In the instant case it is undisputed that the case rested entirely on the testimony of FRIMET and his credibility. Further, it is clear that there was some understanding, some consideration, between FRIMET and the Government which was kept from the jury. Here, as in Giglio, the witness testified in reliance on "the good judgment and conscience of the Government . . .," 405 U.S. at 153, 10 L.Ed.2d at 108. Moreover, the Supreme Court recognized in Giglio that such an understanding sufficiently set forth an "agreement" as to require its disclosure to the jury: "[the representations of the prosecutor], standing alone, contains at least an implication that the Government would reward the cooperation of the witness and hence tends to confirm rather than refute the existence of some understanding for leniency." (emphasis added) 405 U.S. at 153, footnote 4, 10 L.Ed.2d at 108. Here also the representations of Assistant United States Attorney JOEL FRIEDMAN, standing alone, contains at least an implication of an agreement.

Thus, since material evidence which could reasonably have affected the judgment of the jurors was excluded from their consideration in the trial of this case, the conviction here was obtained in violation of the due process requirements of the Fifth Amendment to the United States Constitution and cannot stand.

The Court Below erred in denying MANARITE'S motion to vacate judgment and grant a new trial on this ground.

IV.

THE DISTRICT COURT ERRED IN DENYING APPELLANT'S MOTION TO VACATE JUDGMENT WITHOUT CONDUCTING A HEARING TO RESOLVE THE AVERMENT OF PROSECUTORIAL SUPPRESSION OF MATERIAL, EXCULPATORY EVIDENCE IN THE TRIAL OF THE CASE.

For the reasons and authorities set forth in Section III, above, it is clear that due process considerations require reversal of a conviction where material, exculpatory evidence was suppressed by the prosecution in the trial of the case. In ruling on MANARITE'S motion under 18 U.S.C. § 2255, the Court Below expressed an opinion that the record and affidavits submitted in support of the motion did not show the existence of prosecutorial suppression of material, exculpatory evidence (A.70a-75a). As stated in Section III, supra, it would appear that this opinion is unsupported by the record. Moreover, even if there is room for doubt as to the factual basis of the averments, it would appear that the District Court was in error in failing to conduct a hearing on this issue.

In Smith v. United States, (C.A. 9, 1958) 259 F.2d 125, the Court of Appeals reversed an order of the trial court denying a motion to vacate judgment where, as here, the order was made without conducting a hearing to determine the merit of the claim of knowing use of perjured testimony by the prosecution in the trial of the case. The court in Smith relied on the

pronouncements of Simpson v. Teets, 353 U.S. 926, 77 S.Ct. 720, 1 L.Ed.2d 722, as establishing a right to a hearing on an allegation of prosecutorial suppression of evidence made pursuant to 18 U.S.C. § 2255. Smith v. United States, supra, 259 F.2d at 127. Thus, the court reversed and remanded with instructions to provide a hearing on the allegation even though the allegations were ". . . brief and lack[ing in] particularity." 259 F.2d at 127.

While MANARITE'S motion below was not made in pro se as was the case in Smith, it is submitted that the allegations made by MANARITE, considered with the content of the accompanying affidavits and the patent contradictions of the Government's position by its own agent, JOEL FRIEDMAN (A.46a.7-17), at least raise a sufficient question as to require an evidentiary hearing under the rule of Simpson v. Teets and Smith v. United States, supra. The Court Below decided MANARITE'S motion, adversely to him, on the basis of the records and affidavits. Even if deemed insufficient to show conclusively the knowing suppression of material evidence, the record below at least raises a sufficient allegation as to require a full evidentiary hearing.

Therefore, it is submitted that the District Court was in error in denying MANARITE'S motion on this ground and the decision should be reversed and remanded with instructions to conduct an evidentiary hearing in District Court.

CONCLUSION

It is respectfully submitted that for the reasons stated in Section I, above, the order denying Appellant's motion to vacate judgment should be reversed and, on remand, the District Court should be instructed to order the release of Appellant as he has satisfied the judgment.

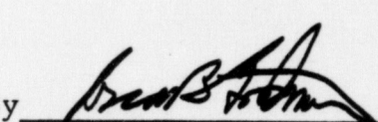
For the reasons set forth in Section II, above, the order denying Appellant's motion to vacate judgment should be reversed and the judgment imposed on July 16, 1970, should be vacated.

For the reasons set forth in Section III, above, the order denying Appellant's motion to vacate judgment should be reversed and remanded with instructions to grant Appellant a new trial.

For the reasons set forth in Section IV, above, the order denying Appellant's motion to vacate judgment should be reversed and remanded with instructions to conduct an evidentiary hearing on the allegations of prosecutorial suppression of material, exculpatory evidence at trial.

Respectfully Submitted:

OSCAR B. GOODMAN, ESQ.

By 

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CERTIFICATE OF SERVICE BY MAILING

The undersigned hereby certifies that two (2) true and correct copies of the above and foregoing Appellant's Brief was, on this 10th day of March, 1975, mailed, postage prepaid, to United States Attorney, Southern District of New York, United States Federal Courthouse, Foley Square, New York, New York.

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March 18, 1975

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New York, New York 10007

Re: Samuel Manarite vs. United States

Gentlemen:

Enclosed herewith please find an original and 25 copies of Appellant's Brief in the above entitled matter, as well as an original and three copies of Motion for Extension of Time within which to File Appendix.

Would you be kind enough to please file the same and notify this office thereafter.

Your cooperation is appreciated.

Sincerely yours,

Oscar B. Goodman

OSCAR B. GOODMAN

OBG:lw

Enclosures:
As Stated